

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5621
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES ALONZO BENJAMIN,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana
(92-CR-20007-01)

(September 16, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges:

PER CURIAM:*

Background

Deputy sheriff Malcolm Bussey observed a pickup truck weaving on the I-10 in Jefferson Davis Parish and stopped the truck because he thought the driver might be intoxicated or sleepy. As Bussey approached the driver and passed the camper shell on the back of

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the truck, he smelled marijuana. Bussey asked the driver, James Alonzo Benjamin, to step out to the rear of the truck and told Benjamin why he had stopped him. Benjamin admitted that he was tired because he was returning from San Antonio where he had gone two days earlier.

Bussey requested proof of insurance and Benjamin indicated that he should ask the passenger, Gerl Herndon Brandon, to retrieve the documents out of the glove box. As Bussey approached the passenger side of the truck, he again smelled marijuana. Brandon could not locate the insurance papers. While she was looking for the insurance documents, Brandon told Bussey that she and Benjamin had been in San Antonio for only one day, an explanation that appeared to be inconsistent with Benjamin's story.

Bussey returned to Benjamin and told him that Brandon could not locate the insurance documents. He then asked Benjamin if he had ever received a citation or had ever been arrested, and Benjamin said no. A computer check, however, revealed that Benjamin had been prosecuted for a narcotics offense in Washington, D.C. Benjamin then admitted that he had been convicted of possession of a small quantity of marijuana, but Bussey believed that it had to be a more serious offense because he was not aware that the U.S. Attorney prosecuted all criminal cases in Washington, D.C. Bussey gave Benjamin a citation for lack of proof of insurance and a verbal warning for improper lane change, and told Benjamin that he was free to go. As Benjamin was leaving, however, Bussey asked him if he would answer a few more questions.

Benjamin agreed to answer additional questions. Bussey asked him if he had any contraband in the truck which Benjamin denied. Benjamin then gave verbal consent to search his car. When Bussey gave Benjamin the written consent form to sign, however, Benjamin became hesitant and asked Bussey what would happen if he refused to sign the consent form. Bussey informed Benjamin that if he declined to sign the consent form, Benjamin and Brandon were free to leave but the truck would be detained until a canine unit could be brought to the scene. After discussing the form with Brandon, Benjamin signed the consent form. Bussey and another officer, Jim Horner, searched the truck and discovered a small quantity of marijuana and some pills in a shaving kit in the cab of the truck and three boxes of marijuana in the back of the truck.

Benjamin was charged in a one-count indictment with possession of marijuana with intent to distribute. He filed a motion to suppress the marijuana alleging that the initial stop was invalid, that there was no probable cause to make the warrantless search, and that his consent to search was not voluntary. This motion originally was denied without a hearing because the factual allegations were too vague, but the district court granted Benjamin's motion for reconsideration. Following a hearing the district court denied the motion to suppress. Benjamin was convicted by a jury, and sentenced to 63 months imprisonment, four years supervised release, and a \$50 special assessment.

Opinion

Benjamin argues that the district court improperly denied his motion to suppress because the initial stop was invalid, there was no probable cause to conduct the search, and his consent to search was not voluntary. When reviewing the denial of a motion to suppress based on live testimony, this Court accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of the law. U.S.A. v. Coleman, 969 F.2d 126, 129 (5th Cir. 1992). The evidence is viewed in the light most favorable to the prevailing party.

Benjamin argues that the initial stop was merely a pretext to conduct an illegal search. Bussey testified at the suppression hearing that he stopped Benjamin because he observed him weaving across the center line and onto the shoulder in violation of Louisiana law, and he was concerned that the driver was intoxicated or sleepy. Off-duty patrolman Arnold Dean Benoit, who was riding with Bussey, also testified that Benjamin was weaving. Because Bussey had a legitimate basis for stopping the truck, his subjective intent is irrelevant. See United States v. Shabazz, 993 F.2d 431, 435 n.3 (5th Cir. 1993) (so long as an officer does no more than is objectively permitted, his subjective motives for making a stop are irrelevant). Although Benjamin and Brandon testified that Benjamin did not cross the lanes, the district court accepted Bussey's version that he observed Benjamin weaving across the lanes, and this Court will not disturb the district court's credibility determinations. See U.S.A. v. Botello, 991 F.2d 189,

194 (5th Cir. 1993), cert. denied, 114 S. Ct. 886 (1994). The initial stop was valid.

Benjamin argues that even if the initial stop was valid, Bussey did not have probable cause to conduct a warrantless search of his truck. Bussey testified that he smelled marijuana when he first approached the driver-side of the truck, and again when he approached the passenger-side to question Brandon about insurance documents. Smelling marijuana would provide probable cause to conduct a warrantless search of the truck. See United States v. Ryles, 988 F.2d 13, 14 n.2 (5th Cir.), cert. denied, 114 S. Ct. 168 (1993); United States v. Michel, 588 F.2d 986, 998 (5th Cir.), cert. denied, 444 U.S. 825 (1979). Benjamin argues, however, that because the marijuana was packaged in multiple layers of cellophane and tape and placed in sealed, heavy-duty, corrugated boxes with baby powder, and Benoit testified that he did not smell the marijuana, it was impossible for Bussey to detect the odor of marijuana. See United States v. Cagle, 849 F.2d 924, 925 n.2 (5th Cir. 1988) (district court's finding that the officer could not smell marijuana that was "contained in a white plastic bag, further contained in plastic, further contained in a white plastic bag and surrounded by gray duct tape," and packed with clothing in a hardback suitcase permeated with the strong smell of baby powder, was not clearly erroneous). The district court found Bussey's testimony that he smelled marijuana credible, and this Court must defer to the district court's credibility determinations. See Botello, 993 F.2d at 194.

Even assuming that Bussey did not have probable cause to conduct a warrantless search, voluntary consent can validate a search. United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, 113 S. Ct. 2427 (1993). Ordinarily the Government has the burden of proving the consent was voluntary by a preponderance of the evidence. The voluntariness of the consent is a question of fact determined by looking at the totality of the circumstances. The Court considers six factors to determine whether the consent was voluntary:

(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

All six factors are relevant, but no one factor is dispositive.

Benjamin argues that his consent was not voluntary because Bussey told him that, if he (Benjamin) refused to give consent to the search, the truck would be detained anyhow, although he and Brandon would be free to go. However, both Bussey and Benjamin testified that Benjamin gave verbal consent to search the truck before Bussey informed Benjamin that the truck would be detained to conduct a canine search. Therefore, Benjamin's consent was not influenced by Bussey's statement that he would detain the truck.

Bussey testified that Benjamin and Brandon gave inconsistent stories regarding their trip to San Antonio; that Benjamin lied about his criminal record; and that he smelled marijuana at the back of the truck. Benjamin also admitted that he was nervous

during the stop. These facts are sufficient to detain the truck for a search based on probable cause. See United States v. Thomas, 12 F.3d 1350, 1366-67 (5th Cir.), cert. denied, 114 S. Ct. 1861, 2119 (1994).

Since the district court's factual findings are reviewed for clear error and credibility determinations are left to the district court, we AFFIRM the district court's denial of Benjamin's motion to suppress, and affirm his conviction.